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REPORT OF THE SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES ON ITS FORTY-SIXTH SESSION

Comments on the draft United Nations declaration on the rights of indigenous peoples

Note by the International Labour Office

1. The International Labour Office has followed carefully the development of the draft United Nations declaration on the rights of indigenous peoples (Sub-Commission resolution 1994/45, annex) at every stage of its consideration in the Working Group on Indigenous Populations, and in the Sub-Commission on Prevention of Discrimination and Protection of Minorities. At each step, the ILO has expressed its support for the process, has made comments and contributions, and has stated its continuing readiness to collaborate further in the process of deliberation.

2. The following notes are offered in order to assist the Commission on Human Rights in its consideration, in whatever form it may decide to proceed.

General comment

3. The Commission will recall that the International Labour Organisation is responsible for the only two international Conventions that have been adopted on this subject: the Indigenous and Tribal Populations Convention, 1957 (No. 107) (supplemented by the Indigenous and Tribal Populations Recommendation, 1957 (No. 104)); and the Indigenous and Tribal Peoples Convention, 1989 (No. 169), which revised Convention No. 107.

4. The Commission will also recall that these two Conventions were adopted with the participation of the United Nations, the Food and Agriculture Organization of the United Nations, the United Nations Educational, Scientific and Cultural Organization and the World Health Organization; and that during its reflections on Convention No. 169, the ILO also benefited from the advice of the Inter-American Indian Institute (see the preambles to each of these Conventions).

5. Convention No. 107 was ratified by 27 States before being closed to further ratification by the entry into force of Convention No. 169. Convention No. 169 has, as of 31 December 1994, been ratified by seven States; and a certain number of further ratifications have been approved by national legislatures and are expected to be communicated in the near future. Six of the ratifications so far received are by States that had earlier ratified Convention No. 107, thereby entailing automatic denunciations of the earlier Convention - in effect, replacement ratifications.

6. Consistency of international law. The ILO's primary concern in the deliberations which the Commission will carry out, is that any standards which may be adopted by the United Nations **should not in any case be lower than those already adopted** - and very recently - by the ILO. This principle is provided for in General Assembly resolution 41/120 of 4 December 1986. It will be evident that a declaration should not contain a lower standard than an international convention; and in particular one that was adopted very recently with the participation of the entire United Nations system.

7. This does not, of course, require that the declaration being considered by the United Nations should be totally consistent with the ILO standards - indeed, some differences are inevitable, as the declaration considers these questions from a different point of view, and for different aims. Most important, it will be an "aspirational" instrument which does not lay down legal requirements in the same sense as a convention.

8. The ILO therefore intends to follow closely the deliberations in the Commission, and will be glad to provide advice and assistance at any time. The Commission may in particular be interested to be informed of the travaux préparatoires for the adoption of Convention No. 169, which will shed light on the arduous deliberations which led to its adoption.

9. Before examining the provisions of the draft declaration in the light of Convention No. 169, it is worth noting that the representatives of the indigenous and tribal peoples who attend meetings at the United Nations and the ILO do not always agree with each other about the goals or provisions of the international standards to be adopted. Thus, some have expressed reservations about ILO Convention No. 169, as they have about the draft declaration, while others favour ratification of Convention No. 169 and adoption of the declaration at an early stage. It is necessary to take account of the views of the representatives of these peoples, while recognizing that it is difficult to be sure that the views expressed in international forums always represent a consensus in indigenous communities.

Terminology

10. The ILO has brought to the attention of the Working Group on several occasions the question of terminology, and of definitions. There are two aspects which need to be considered.

11. The term "indigenous". It will be recalled that the ILO has used the term "indigenous and tribal" since the early 1950s, in order not to restrict coverage of its standards in this area. The first report to the International Labour Conference which was prepared for the revision of Convention No. 107 stated:

> "It may be noted that several countries that have tribal populations which are not considered as indigenous have ratified Convention No. 107; attempts to analyse the historical precedence of different parts of the national populations would detract from the need to protect vulnerable groups which in all other respects share many common characteristics, wherever they are found."

12. This view was supported in the discussions which followed in the ILO. It may also be noted that some countries which have ratified Convention No. 107 have expressed the position that the draft United Nations declaration does not apply to their situations, as there are no segments of the population in the country which are "indigenous" as compared to other segments of the population. The ILO therefore suggests that the Commission consider whether the use of "indigenous" alone might in fact convert the draft declaration from a universal instrument to one of only regional application.

13. Another element which should be considered is the need to ensure that international law is consistent. It would not appear desirable to adopt instruments, the targets of which are exactly the same, but using different terminology which is taken by States to apply to different groups of population. The terms in the ILO instruments have caused little controversy since 1957, and should be retained also in the United Nations instrument when it is adopted.

14. The term "peoples". The 1989 ILO Convention refers to indigenous and tribal **peoples** (emphasis added). The same controversy which has marked the discussion of this term in the Working Group took place in the ILO beforehand. In the ILO Convention, a provision was added as paragraph 3 of article 1 stating:

> "The use of the term 'peoples' in this Convention shall not be construed as having any implications regarding the rights which may attach to the term under international law."

15. This has been taken by some - in particular by some representatives of indigenous and tribal peoples - to mean that the ILO Convention denies that those covered by it have the right to self-determination. This is clearly not the case, however; the International Labour Conference simply took the position that the question of self-determination was for the United Nations to resolve, not for the ILO. This is particularly the case when the extent of the right of self-determination and the exact significance of the term

"peoples" are clear for no one. The ILO therefore supports the use of the term "peoples" as being consistent with Convention No. 169; while suggesting that the Commission on Human Rights should examine the relationship between the use of this term and the implications which might arise from other international legal instruments.

Provisions of the draft declaration

16. Preamble generally. The preamble should include a reference to the two existing international Conventions on the subject, as is the usual practice when adopting international instruments which build on previous international law. This is particularly so in view of the fact that the draft declaration is closely based on Convention No. 169 in a certain number of respects. The sixteenth preambular paragraph does not fully meet this need, leaving unclear which human rights instruments actually apply to these peoples. It may also be productive to note the cooperation received in the drafting of this instrument from other parts of the United Nations system and other international entities (compare ninth preambular paragraph of ILO Convention No. 169).

17. Sixth preambular paragraph. There is an internal contradiction in this paragraph: the rights of these peoples do not "derive from their political, economic and social structures ...", etc. - these rights are inherent in all human beings. This might be better phrased as "and to respect their political, economic and social structures and their cultures, ..." etc.

18. Seventh preambular paragraph. Replace "wherever they occur" by "against them". The purpose of the indigenous peoples' organizing is not one of fighting oppression generally, but rather to protect their own situation.

Operative paragraphs

19. Article 1. Compare article 3 of ILO Convention No. 169. The term "international human rights law" seems unnecessarily vague (see the comments on the sixteenth preambular paragraph above).

20. Article 9. While the intent of this article is entirely positive, the second sentence may give rise to problems, especially where protective measures have been instituted in States which may have the effect of diminishing the capacity of individuals or groups to exercise the full rights of all citizens. The dilemma here is obvious, between paternalistic protection and that which is objectively necessary for the protection of groups, e.g. restrictions on capacity to alienate lands. The collective effect of articles 1, 2, 4, 5 and 6, inter alia, should in fact obviate the need for the second sentence of this article.

21. Article 10 should be moved to Part VI of the instrument. The right to freedom from forcible removal and to return cannot be isolated from other land rights.

22. Article 11(a). The question of conscription of indigenous citizens for military service is a difficult one. Note might be taken of article 11 of Convention No. 169, which provides:

> "The exaction from members of the peoples concerned of compulsory personal services in any form, whether paid or unpaid, shall be prohibited and punishable by law, except in cases prescribed by law for all citizens".

Under the ILO's Forced Labour Convention, 1930 (No. 29), compulsory military service is recognized as an exception allowed to the prohibition of forced or compulsory labour. Therefore, while it is compatible with Convention No. 169 to exempt members of indigenous peoples from compulsory military service, it is also allowable to conscript them. Some thought might therefore be given to whether it is desirable to issue a blanket exemption of all indigenous individuals from obligations binding on all other citizens, whatever the situation of the indigenous peoples in a given country. It might be desirable as an alternative to separate this question from the situation contemplated in this article of the draft declaration, which is focused on military service in abusive conditions. All other provisions of this article would appear to be well adapted to this problem.

23. Article 14. The second paragraph of this article is oddly placed, as part of a provision on maintenance of language. The linguistic aspect of the question is only one of the points that needs to be addressed. The Commission's attention is drawn to article 12 of Convention No. 169:

> "The peoples concerned shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights. Measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means."

Among the points to be noted here is the distinction between "appropriate" in the draft United Nations declaration, and "effective" in the ILO Convention.

24. Article 15. This provision on education would appear to be compatible with articles 26 to 31 of the ILO Convention, but there are some points that might be better expressed. In the first sentence of the first paragraph, the "education of the State" is not clear. There is no provision in the draft declaration, as there is in articles 28 and 29 of Convention No. 169, to provide for members of indigenous peoples being able to acquire education that will enable them to "participate fully and on an equal footing in their own community and in the national community (art. 29, C. 169).

25. Article 18. There is nothing incompatible with article 20 of Convention No. 169, though this provision is very brief. The word "salary" should be changed to "remuneration", which better reflects the situation in which indigenous and tribal peoples earn their living when within the monetary economy.

26. Land rights. The provisions of the draft declaration (arts. 25-28 and 30) are generally compatible with articles 13 to 19 of Convention No. 169, though the declaration provides for a more extensive range of rights in some respects. The last paragraph of article 28 would be more appropriately placed with other health-related provisions. It is odd that article 30 is separated from other provisions on land rights by article 29, which deals with intellectual property. There is no provision for shared use or pastoral peoples (see art. 14(1), Convention No. 169), for the provision of additional land to allow for future growth and development (art. 19, C. 169), or for assistance in developing their lands (ibid.).